NO. 34107-1-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

ANTHONY RENE VASQUEZ,

Defendant/Appellant.

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

\

ARGUMENT

The State's argument concerning Count 6 amounts to pure speculation. Drive-by shooting may not require a named victim; however there must be some proof that a person was otherwise endangered under the facts and circumstances of the particular case.

In Mr. Vasquez's case there was a single shot directly into the head of Juan Garcia. The other potential victims were named in two other counts. These were the occupants of the car in which he was a passenger.

The State's argument amounts to speculation that some unknown person may have been in the area and subject to injury from the shot fired. There was no one else inside the car. There was no one else immediately outside the car.

There is no indication that the shot fired would enter the Mini Mart.

There is no indication that the shot fired would have gone any place other than Mr. Garcia's head.

The State's argument that the general public was endangered does not fit within the facts and circumstances of Mr. Vasquez's case. When considering danger to the general public, the facts and circumstances of a drive-by shooting would be where there are shots fired from a moving car into a crowd where the potential for multiple victims exists.

The charging language of Count 6 is insufficient to charge a crime under the facts and circumstances presented to the jury.

The State's argument concerning the phrase "immediate area" relies upon cases having nothing to do with drive-by shooting. *State v. Ohlson*, 162 Wn.2d 1, 168 P.3d 1273 (2007) is not analogous. In fact, the language is *dicta*.

"Immediate area" is defined in caselaw in Mr. Vasquez's original brief. He relies upon that definition in connection with the argument that the State failed to present sufficient evidence that the shooting occurred within the immediate area of the car in which he arrived.

Moreover, criminal statutes must be strictly construed. Any ambiguity must be construed in favor an accused. "Penal statutes must be construed 'so that only conduct which is clearly within the statutory terms is subject to punitive sanctions.'" *State v. Hampton*, 143 Wn.2d 789, 794, 24 P.3d 1035 (2001) *quoting State v. Johnson*, 119 Wn.2d 167, 172, 829 P.2d 1082 (1992).

Additionally, consideration needs to be given to the legislative intent at the time the drive-by shooting statute was enacted. The Legislature stated:

> The legislature finds that increased trafficking in illegal drugs has increased the likelihood of drive by shootings. It is the intent of the legislature in sections 102, 109, and 110 of this act to categorize such reckless and

> criminal activity into a separate crime and to provide for an appropriate punishment.

Laws of 1989, Ch. 271, Sec. 108.

The Legislature limited drive-by shootings to offenses involving trafficking in illegal drugs. Legislative intent is clear.

Finally, the State's argument concerning the jury's determination that both prongs of the first-degree murder statute, as charged, were met and did not constitute an inconsistency is not supported by appropriate authority.

State v. Ng, 110 Wn.2d 32, 750 P.2d 632 (1988) involved a determination of guilt on one count and acquittal on another count. It is not analogous to a conviction on two counts for the same offense where the elements are contrary to one another.

The State goes on to claim that murder by extreme indifference is a lesser included offense of premeditated murder. No such authority exists.

There was either premeditation or extreme indifference. Even if the special verdicts can be reconciled, Mr. Vasquez is entitled to rely on the determination of extreme indifference. This would fit more closely with the State's theory concerning the drive-by shootings.

The State's reliance upon *State v. Turner*, 169 Wn.2d 448, 238 P.3d 461 (2001) is *inaposite* due to the fact that it involved convictions of greater and lesser included offenses.

In Mr. Vasquez's case the conviction is for a single offense of first degree murder. The special verdicts, which apply to increased punishment, are in conflict. Mr. Vasquez is entitled to receive the benefit of the lesser punishment based upon the rule of lenity. As announced in *State v. Kier*, 164 Wn.2d 798, 811, 194 P.3d 212 (2008): "… [A]n ambiguity in the jury's verdict…, under the rule of lenity, must be resolved in the defendant's favor."

State v. Mitchell, 29 Wn. (2d) 468, 188 P. (2d) 88 (1947) relied upon by the State, does not negate Mr. Vasquez's position. In the *Mitchell* case the jury returned a general verdict on murder with regard to all three prongs of the first-degree murder statute. The court ruled there was insufficient evidence concerning the extreme indifference prong and reversed the conviction. The Court noted that it could not determine which prong the jury relied upon.

In Mr. Vasquez's case it is apparent that the jury relied upon both prongs. The prongs are inconsistent due to the fact that there are differing elements for the particular alternative means of committing first degree murder. Thus, the rule of lenity applies.

Mr. Vasquez otherwise relies upon the argument contained in his original brief and requests that the Court reverse his convictions for drive-by shooting and rule that the extreme indifference prong of first degree murder is the applicable prong for that conviction.

DATED this 28th day of September, 2017.

Respectfully submitted,

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NO. 34107-1-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	GRANT COUNTY
Plaintiff,	)	NO. 13 1 00599 1
Respondent,	)	
	)	
v.	)	**CERTIFICATE OF SERVICE**
	)	
ANTHONY RENE VASQUEZ,	)	
	)	
Defendant,	)	
Appellant.	)	
	)	

I certify under penalty of perjury under the laws of the State of Washington that on this 28th day of September, 2017, I caused a true and correct copy of the *REPLY BRIEF* and to be served on:

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